U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-K-D-

DATE: FEB. 12, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a teacher and autism spectrum disorder education researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest.

The Petitioner appealed the matter to us. We dismissed the Petitioner's appeal, and reaffirmed that decision in two subsequent motion adjudications.[1] The matter is now before us on a third motion. With the motion, the Petitioner submits a statement and other documents claiming that her first two attorneys provided ineffective assistance.[2] She asks that we grant her motion to reopen and approve her request for a national interest waiver. Upon review, we will deny the motion.

I. LAW

[1] *Matter of C-K-D-*, ID# 687588 (AAO Aug. 22, 2017) was our most recent decision in this matter.

[2] The Petitioner was initially represented in these proceedings by attorney [redacted]. On appeal and for part of the first motion, the Petitioner was represented by attorney [redacted] withdrew her appearance in October 2016. The Petitioner was subsequently represented by attorney [redacted] for the first and second motions. With respect to the current motion, the Petitioner is not represented by counsel.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

First, *Lozada* sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.

- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.

- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the petitioner did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his or her version of events discourages baseless allegations, and the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his or her client in disparaging the quality of the representation.

We may deny a claim of ineffective assistance if any of the *Lozada* threshold documentary requirements are not met. *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000). Second, if the petitioner satisfies these threshold documentary requirements, she must also show that former counsel's assistance was so deficient that the she was prejudiced by the performance.[3] Specifically, the petitioner must show that there is a reasonable probability that the outcome would have been different without former counsel's mistakes,[4] and that she had at least a plausible ground for relief.[5]

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[3] *Lozada* at 632. In *Lozada*, the Board determined that Lozada was not prejudiced by counsel's failure to file an appeal brief (resulting in the summary dismissal of the appeal) because: he received a full and fair hearing at his deportation hearing, at which he was given every opportunity to present his case; he did not allege any inadequacy in the quality of prior counsel's representation at the hearing; the immigration judge considered and properly evaluated all the evidence presented; and the immigration judge's decision was supported by the record.

[4] *Yu Tian Li v. United States*, 648 F.3d 524, 527 (7th Cir. 2011); *Delhaye v. Holder*, 338 Fed. Appx. 568, 570 (9th Cir. 2009).

There is no prejudice if the adverse decision would have been issued even without former counsel's errors. *See, e.g., Minhas v. Gonzales*, 236 Fed. Appx. 981 (5th Cir. 2007).

II. ANALYSIS

In denying the previous motion, we determined that the Petitioner had not demonstrated that she meets the second and third prongs set forth in the *Dhanasar* analytical framework. The present motion offers no new facts or evidence addressing her eligibility or overcoming our findings.

Rather, the motion includes a statement from the Petitioner asserting that her initial attorney, [redacted] hastily filed the Form I-140 without waiting for her first research article to be published. In addition, she contends that her subsequent attorney, [redacted] sent in her supporting evidence six months later and indicated to her that this documentation submitted "after the initial filing date would be admissible." The Petitioner further states that her attorneys "continued to take money," did not provide proper representation, and took advantage of her. She also submits a "Service Obligation Exit Certification" between her and the [redacted] and Florida Bar Inquiry/Complaint Forms detailing her interactions with counsel. Furthermore, the Petitioner offers email communications with her former attorneys relating to the preparation of her Form I-140 and her child's Form I-485, Application to Register Permanent Residence or Adjust Status. Lastly, she presents a June 2017 letter she sent to [redacted] and [redacted] stating that they caused her "personal and financial hardships" and requesting a refund of her attorney fees and USCIS filing fees.[6]

The Petitioner has not provided documents meeting the evidentiary requirements set forth in *Lozada*. While the Petitioner's motion includes a signed statement and Florida Bar Inquiry/Complaint Forms listing the dates her documents were submitted to USCIS and discussing her issues with counsel's representation, she did not provide a detailed description of their agreement outlining the specific actions counsel would take. Furthermore, the June 2017 refund request letter is not sufficient evidence indicating that she informed former counsel of the allegation of ineffective assistance and that they were given an opportunity to respond to that allegation.[7]

Moreover, the Petitioner has not shown that former counsels' actions prejudiced the outcome of the proceedings. Even if her prior attorneys had delayed filing the Form I-140 until after publication of the Petitioner's first article and had submitted all supporting documentation at the time of filing, the record does not show that the outcome of this matter would have been different. Finally, the present motion does not offer new facts or evidence demonstrating that the Petitioner satisfies the second and third prongs of the *Dhanasar* analytical framework.[8] The motion to reopen will therefore be denied.

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[5] *See Martinez-Hernandez v. Holder*, 778 F.3d 1086, 1088 (9th Cir. 2015).

[6] This letter does not inform [redacted] and [redacted] that the Petitioner was filing a complaint with the Florida Bar.

[7] Nor does the record contain a response by [redacted] or [redacted]

[8] We note that [redacted] represented the Petitioner for both the first and second motions. The Petitioner's current

III. CONCLUSION

The Petitioner has not met the relevant evidentiary requirements identified in *Lozada*, nor has she satisfied the three prongs set forth in the *Dhanasar* analytical framework. Accordingly, we find that she has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The motion to reopen is denied.

Cite as *Matter of C-K-D-*, ID# 943846 (AAO Feb. 12, 2018)

motion does not allege that [redacted] provided ineffective assistance. Thus, the Petitioner has had opportunities to remedy or address any deficiencies in the information and evidence that initial counsel provided to USCIS.